

ST 13-0041-GIL 08/23/2013 TELECOMMUNICATIONS EXCISE TAX

Telecommunications Excise Tax is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers. See 35 ILCS 630/1 *et seq.* (This is a GIL.)

August 23, 2013

Dear Xxxxx:

This letter is in response to your letter dated July 11, 2013, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

ABC is a supplier of tax compliance software.

We are currently reviewing all states to determine the sales tax status of certain billing protocols in the colocation data service industry. In a typical colocation arrangement, a provider invoices recurring charges for rack or cabinet space, internet bandwidth, and electrical power to a customer locating computer hardware in the providers facilities. In addition to these recurring customer charges, provider offers other colocation managed services on a stand-alone basis as requested by customers and separately states various combinations of its colocation and managed service charges on their customer's invoice.

In particular there are charges that colocation service providers will charge their customers for rack-space. Here the customer in addition to renting the server from the colocation facility also rents on a per month basis the actual space where that server is to be stored. We understand the nature of this transaction to be the rental of real property and if there is no sales tax on the rental of real property then there would also be no sales tax on the rental of rack-space from a colocation service provider.

However, we have found certain exceptions to this rule and that some states view the transaction as a taxable rental of TPP (or of real property). Does your state consider the transaction cited above to be a taxable rental?

In addition we would like to know if a monthly charge for electricity passed on to the customer by the provider is subject to the state level sales tax. This charge is not a meter-based electric charge but more like a percentage of the service providers overall electric bill. We have found that most states consider the service provider to be the end-user of the electricity and therefore the corresponding electric charge billed to the customer is not a taxable transaction. Is the same true in your state or is there some regulation which taxes this charge?

Thank you in advance for your prompt reply.

DEPARTMENT'S RESPONSE:

Retailers' Occupation Tax

The Illinois Retailers' Occupation Tax (commonly known as sales tax) is imposed upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 35 ILCS 120/1 et seq. This tax is measured by the seller's gross receipts from such sales made in the course of such business. See 86 Ill. Adm. Code 130.101. Transactions which do not involve the sale of tangible personal property at retail are not subject to the Retailers' Occupation Tax. In addition, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 35 ILCS 105/1 et seq. and 86 Ill. Adm. Code 150.101.

The State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: conditional sales and true leases. A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if a lessor is guaranteed at the time of the lease that the leased property will be sold, that transaction is considered to be a conditional sale at the outset of the transaction. Persons who purchase items for resale under conditional sales contracts can avoid paying tax to suppliers by providing certificates of resale that contain all the information set forth in 86 Ill. Adm. Code 130.1405. All receipts received by a lessor/retailer under a conditional sales contract are subject to Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.2010. The lessors/retailers generally owe Retailers' Occupation Tax on any installment payments when they are received by the lessors/retailers. The lessees/purchasers owe corresponding Use Tax on the amount of the installment payments that are collected by the lessors/retailers.

A true lease generally has no buy out provision at the close of the lease. If a buy-out provision does exist, it must be a fair market value buy-out option in order to maintain the character of the true lease. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See 86 Ill. Adm. Code 130.220. As end users of tangible personal property located in Illinois, lessors of a true lease owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability. As stated above, in the case of a true lease, the lessors of the property being used in Illinois would be the parties with Use Tax obligations. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of 86 Ill. Adm. Code 150.310.

Telecommunications Excise Tax

The Telecommunications Excise Tax Act, 35 ILCS 630/1 *et seq.*, imposes a tax upon the act or privilege of originating or receiving in the State of Illinois interstate or intrastate telecommunications by a person in Illinois at the rate of 7% of the gross charge for such telecommunications purchased at retail from a retailer by such person. Under Section 2(c) of the Act,

“‘[t]elecommunications’, in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. As used in this Act, ‘private line’ means a dedicated non-traffic sensitive service for a single customer, that entitles the customer to exclusive or priority use of a communications channel or group of channels, from one or more specified locations to one or more other specified locations. The definition of ‘telecommunications’ shall not include value added services in which computer processing applications are used to act on the form, content, code and protocol of the information for purposes other than transmission. ‘Telecommunications’ shall not include purchases of telecommunications by a telecommunications service provider for use as a component part of the service provided by him to the ultimate retail consumer who originates or terminates the taxable end-to-end communications. Carrier access charges, right of access charges, charges for use of inter-company facilities, and all telecommunications resold in the subsequent provision of, used as a component of, or integrated into end-to-end telecommunications service shall be non-taxable as sales for resale.” 35 ILCS 630/2(c).

“‘Gross charge’ means the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer, valued in money whether paid in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of such telecommunications, the cost of materials used, labor or service costs or any other expense whatsoever.

“‘Gross charges’ does not include charges for customer equipment, including equipment that is leased or rented by the customer from any source, wherein such charges are disaggregated and separately identified from other charges. ‘Gross charges’ also does not include charges for nontaxable services or telecommunications if (i) those charges are aggregated with other charges for telecommunications that are taxable, (ii) those charges are not separately stated on the customer bill or invoice, and (iii) the retailer can reasonably identify the nontaxable charges on the retailer's books and records kept in the regular course of business. If the nontaxable charges cannot reasonably be identified, the gross charge from the sale of both taxable and nontaxable services or telecommunications billed on a combined basis shall be attributed to the taxable services or telecommunications. The burden of proving nontaxable charges shall be on the retailer of the telecommunications.

Electricity Excise Tax

The Electricity Excise Tax Law, 35 ILCS 640/1, is imposed upon the privilege of using in this State electricity purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service. The incidence of this tax is on the consumers of electricity. Generally, if you sell electricity at retail to your customers, you are considered a delivering supplier of electricity and therefore liable for the collection of the tax. However, if you pay the tax to your supplier and then pass on a percentage of your overall electricity charge to a customer, whether included in a monthly rental charge or as a separate charge, you would not be responsible for the collection of the tax.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department’s Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Associate Counsel

RSW: